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No. _____

In The

# Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

*Petitioner,*

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Third District Court Of Appeal Of The State Of Florida**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), precludes an action for defamation by a candidate for the U.S. House of Representatives who received bomb and death threats as a result of statements by a periodical circulating in the Cuban American community of South Florida that branded her as a "representative of [Fidel] Castro's interests in the United States" and a "Castroite," when such statements were false and were based upon numerous false statements characterized as facts, and where historically such statements have led to the death and injury of others.

2. Whether the state courts below are correct in their conclusion that defamatory statements characterized as opinion, but explicitly supported by false facts, are not actionable under the First Amendment simply because the underlying false facts used to support the defamatory statement, when construed in isolation, may not be independently defamatory.

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**On Petition For A Writ Of Certiorari To The Third District Court Of Appeal Of The State Of Florida**

## PETITION FOR A WRIT OF CERTIORARI

Magda Montiel Davis respectfully petitions for a Writ of Certiorari to review the judgment of the Third District Court of Appeal of the State of Florida.

## OPINIONS BELOW

The judgment of the Court of Appeal of Florida, Third District (Appendix ["App."], *infra,* 1), which affirmed *per curiam,* without opinion, the judgment of the trial court is reported at 653 So.2d 516 (Fla. 3rd DCA

1995). The judgment and opinion of the trial court (App., *infra*, 2-6) is unreported.

## JURISDICTION

The Court of Appeal entered its judgment on April 26, 1995. App., *infra*, 1. Article V, § 3(b)(3) of the Florida Constitution prohibits the Supreme Court of Florida to review *per curiam* decisions of District Courts of Appeal rendered without opinion. *St. Paul Title Ins. Corp. v. Davis*, 392 So.2d 1304 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment has been made applicable to the states through the due process clause of the Fourteenth Amendment. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

## STATEMENT OF THE CASE

Magda Montiel Davis, the Petitioner, filed this lawsuit in October, 1992 as a result of statements that the Respondents published in their periodical, *La Verdad*, on September 24 and October 1, 1992. The Respondents accused Ms. Davis, then a candidate for the United States House of Representatives, of being "a representative of Castro's interests in the United States" and a "Castroite."

The Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, dismissed with prejudice Ms. Davis' Amended Complaint on November 16, 1994, citing this Court's opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). App., *infra*, 2-6. The Third District Court of Appeal of Florida affirmed the judgment of the Circuit Court, without opinion, again citing *Milkovich*. App., *infra*, 1. Ms. Davis then timely filed this Petition for a Writ of Certiorari.

### I. Factual Background to the Congressional Candidate's Libel Suit

Magda Montiel Davis, a Cuban American, announced her candidacy for the United States House of Representatives on July 13, 1992. Her opponent was the incumbent, Ileana Ros-Lehtinen, also a Cuban American. Prior to that time, Ms. Davis had been a practicing attorney in Florida since 1978.

Beginning in mid-September, 1992, articles and front-page headlines concerning Ms. Davis' candidacy began to appear in the Respondents' periodical, *La Verdad* ("*The*

*Truth*"). The September 24 and October 1, 1992 publications of this periodical adduced numerous false assertions to support their accusations that Ms. Davis is Fidel Castro's agent.

The front-page headline of the October 1, 1992 publication proclaims, "*Our Legislator Ileana Ros-Lehtinen Takes on the Defender of Castro: More Evidence of Montiel Davis' Links to the Tyrant Castro.*" App., *infra*, 21, 23. The "evidence" to which the headline referred was the fact that Ms. Davis' husband had once represented the National Bank of Cuba and Cubaexport as local counsel in a lawsuit filed thirteen years prior to the article's publication. App., *infra*, 24. Ms. Davis' husband was not then, and never has been, Castro's attorney. Nonetheless, the article falsely indicated that Castro is currently his, as well as Ms. Davis', client by explaining that if Ms. Davis took "Ileana's seat" in Congress, the "opportunities to serve their client Fidel Castro would multiply even more." App., *infra*, 24. "It is understood, therefore, that those who represent the interests of Castro in exile, such as Montiel Davis and her husband [ ], are anxious to replace her." App., *infra*, 26. The October 1, 1992 publication further stated that "we continue receiving reports of [Ms. Davis' husband's] links to the [Cuban] government," and "as we receive these documents and we verify them, we publish them for the information of the voters." App., *infra*, 23-24.

The September 24, 1992 publication is similar. The front-page headline states, "Castroite ['Castrista'] Democrat Challenging our Congresswoman Ileana Ros." App., *infra*, 30, 32. The article's first five paragraphs explicitly

attempt to prove that Ms. Davis and her husband represent and "respond to" Castro's interests. App., *infra*, 32. For example, the article stated that Francisco Aruca, a client of Ms. Davis' husband, is Castro's "most visible agent in Miami." App., *infra*, 33. This statement, too, is false in that Mr. Aruca has never been an agent of Castro.

The September 24, 1992 article further stated that 1989 court papers described another of her husband's clients, Marazul Charters, Inc., as a "foreign corporation." App., *infra*, 32. The article accounted for this by stating that the company is "registered as foreign, because it belongs to Castro's government." App., *infra*, 33. Respondents repeated this assertion the next week in the first paragraph of the October 1 article. App., *infra*, 23. In fact, Marazul Charters was described in court papers as a "foreign corporation" because it had been incorporated in New York, not Florida.

Moreover, the September 24 publication of *La Verdad* tried to show that Ms. Davis and her husband are united in their service of Fidel Castro, his regime and his "agents" Francisco Aruca and Marazul Charters. It asserts four times that Ms. Davis and her husband are law partners, which they never have been. App., *infra*, 32-33. On September 30, 1992, Ms. Davis' then attorney served a retraction demand on Respondents referencing those statements, among others. App., *infra*, 18. Yet, the next day Respondents republished the same false facts, adverting to the previous week's publication in which "[w]e made the clarification then that this Montiel Davis, a lawyer who was born in Cuba, is a member with her husband of the latter's law firm." App., *infra*, 23.

Respondents concluded from all of the above falsehoods that Ms. Davis and her husband's "law firm":

> was chosen by the *government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul, a firm registered as foreign, because it belongs to Castro's government.*
>
> It is to be supposed that Castro was not going to trust his money and the legal defense of his most visible agent in Miami, [Francisco] *Pancho Aruca, to a law firm which was his enemy politically or one which he could not fully trust.*

App., *infra*, 32-33 (emphasis in original).

It is not true that Castro chose "the couple's law firm" (App., *infra*, 32), to represent Marazul Charters, or even that Ms. Davis and her husband are now, or have ever been, members of the same law firm. Castro, in fact, never chose any law firm to represent Marazul Charters. The clear message of the article was that a candidate for the U.S. House of Representatives was an agent for the Cuban Government.

Immediately after *La Verdad* published its articles, Ms. Davis began to suffer the adverse consequences of the accusations therein. Those consequences included everything from public name-calling to bomb and death threats. App., *infra*, 12. She was subjected to contempt, repudiation and humiliation from close friends and complete strangers. App., *infra*, 12, 15-16. Her personal life and professional life were severely damaged. App., *infra*, 15-16.

## II. Proceedings Below and How the Federal Question Was Presented

After serving retraction demands on the Respondents in conformance with Florida law that notified the Respondents that they would "be held personally responsible for any incitement to violence against Ms. Davis or her campaign that [their] article[s] may cause" (App., *infra*, 19), Ms. Davis sued the Respondents in October, 1992. Ms. Davis filed an Amended Complaint in March, 1994, alleging libel in two counts based on the statements and implications in *La Verdad*'s articles that Ms. Davis "represents Castro's interests in the United States" and is a "Castroite."

The Amended Complaint set out lengthy allegations pertaining to the repressive climate of political speech that obtains in South Florida on the issue of Castro's Cuba. It explained that, for over thirty years, Miami's Cuban community (which includes outlying suburban areas in Dade County) has been dominated by hard-liners who have been actively and demonstrably hostile to Fidel Castro's regime and to any perceived (whether accurate or not) supporters of it. App., *infra*, 8-12. Those hard-liners have manifested their dominance through acts of violence, examples of which include the execution of persons who negotiated for the release of political prisoners from Cuba; the attempted assassination of a local radio newscaster for a remark perceived as too soft on communism; twin bombings in 1990 of the Cuban Museum in Miami for the display of art work created by residents of Cuba; and death threats against the publisher and executives of *The Miami Herald* for their criticism of

the Cuban American National Foundation. App., *infra*, 9-11.[1]

The Amended Complaint further alleged that, given the climate of repression that these and other acts of violence have engendered in the Miami area, and the ensuing hypersensitivity to issues relating to Cuba and Castro, "to be denounced as a 'Castrista' [Castroite], or as Castro's representative, . . . *immediately* singles [out] a person as a Communist and Castro supporter and summons the hatred, violence, contempt and prejudice of the audience towards the individual singled out." App., *infra*, 12. That is what happened to Ms. Davis upon the Respondents' publication of the September 24 and October 1, 1992 articles in *La Verdad* and was the essence of the lawsuit.

The Respondents filed a motion to dismiss the amended complaint on April 27, 1994. Among other grounds of dismissal, the Respondents asserted that the statements and implications sued upon were not actionable under the First Amendment to the United States Constitution. The Respondents' memorandum in support of their motion to dismiss specifically relied upon this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Respondents also maintained that this Court's decisions in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988);

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[1] The repressive climate of political speech in South Florida on issues relating to Cuba has been well documented in, *inter alia*, Americas Watch/Fund for Free Expression, *Dangerous Dialogue: Attacks on Freedom of Expression in Miami's Cuban Exile Community*, Vol. 4, Issue 7, August, 1992, and in a follow-up report issued in 1994.

*National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), supported dismissal of the amended complaint.

The Circuit Court heard oral argument on October 9, 1994. Without an evidentiary hearing, the court issued its Final Judgment of Dismissal on November 16, 1994, dismissing Ms. Davis' Amended Complaint with prejudice. App., *infra*, 2-6. The court held that the "statements sued upon are protected by the First Amendment as non-actionable expression constituting political opinion and judgments." App., *infra*, 2. The court reached this decision by applying *Milkovich*, which it stated "controls the disposition of this case." App., *infra*, 3.

Borrowing nearly verbatim from the Respondents' memorandum in support of their motion to dismiss, the court explained that "this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech," which included the *Bresler*, *Letter Carriers* and *Falwell* decisions. App., *infra*, 4.

On November 22, 1994, Ms. Davis filed a notice of appeal. After the parties submitted briefs and the Third District Court of Appeal heard oral argument, the court affirmed the judgment of the Circuit Court without opinion, citing *Milkovich*. App., *infra*, 1.

This timely Petition for a Writ of Certiorari follows.



## REASONS FOR GRANTING THE PETITION

### I. The Petition for a Writ of Certiorari Should Be Granted Because This Case Raises Significant Questions Regarding the Defamation of Persons Seeking Federal Office

#### A. The State Courts' Decisions Sanctioned Defamatory Statements Based on False Facts Against a Candidate for the United States Congress Which Resulted in Violent Assaults on the Candidate

The state court decisions below have expressly sanctioned the defamation, based on false facts, of a candidate for congressional office, which resulted in violent assaults on the candidate. If the state court decisions stand, candidates for federal public office would be subject to defamation and libel, leading to bomb and death threats, as here, without any redress for such defamation. The state court decisions, by protecting even defamatory statements based on false facts on the grounds that the defamatory statements themselves are not sufficiently "factual" or susceptible of verification to support an action for libel, permit any publisher who wishes to defame or libel a federal candidate or federal official to do so with impunity and employ any false facts of the publisher's choosing, as long as the publisher is careful to fabricate supporting facts that are not defamatory. The law expressed by the state courts below now permits defamation on the grounds that the speaker's defamatory statement is merely opinion, even if the "opinion" *is based upon untruths the speaker has fabricated specifically to make the defamatory statement more convincing to the reasonable reader.* Petitioner respectfully submits that this Court's jurisprudence will not bear this interpretation against

federal office seekers, particularly where it has resulted in violent assaults, and that the First Amendment does not require this result.

The Respondents' defamatory statements are actionable because they did not merely express objective interpretations of political positions that a federal candidate had espoused during her campaign, but were libelous statements explicitly based on verifiably false facts concerning that candidate. Respondents and the Courts below, however, analyzed the statements that Ms. Davis "is a representative of Castro's interests in the United States" and a "Castroite" as if those statements appeared in a vacuum unrelated to the context of the Respondents' false statements about Ms. Davis' purported relationship to Castro, and unrelated to their effect against one seeking federal office.

Consequently, the state courts below held the defamatory statements to be privileged under the First Amendment, notwithstanding the patent falsity of the facts supporting those libels and the harm occasioned to Ms. Davis and her congressional campaign thereby. But as *Milkovich* makes clear, a reasonable factfinder must assess the impact of the various statements in the articles, as well as the headlines, to determine whether the articles imply an assertion that is factually false and defamatory. *Milkovich*, 497 U.S. at 21; *see also id.* at 23-24 (BRENNAN, J., dissenting) (agreeing with the Court that "the 'statement' that the plaintiff must prove false under [*Philidelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986),] is not invariably the literal phrase published, but rather what a reasonable reader would have understood the author to have said"). Viewing the September 24 and October 1, 1992, *La Verdad* articles *in toto*, it is clear that the

Respondents sought to buttress their claim that Ms. Davis is Castro's representative or agent by presenting false "facts" to provide the basis for that accusation.

The September 24 article, for example, stated that Ms. Davis' husband had represented Francisco Aruca in a lawsuit, as well as his "foreign corporation," Marazul Charters. App., *infra*, 32. The article falsely stated that Aruca is an agent of Castro – "his most visible agent in Miami" – and that Marazul Charters was labeled in court papers as a "foreign corporation" because "it belongs to Castro's government," not because it was incorporated in another state. App., *infra*, 32. The article further stated falsely that Ms. Davis' husband's law firm was "chosen by the *government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul.*" App., *infra*, 32-33 (emphasis in original). The article ties all of this back to Ms. Davis by asserting that "Montiel Davis is a member of her husband's law firm" and "a partner and wife of a lawyer trusted by Fidel Castro." App., *infra*, 32-33. Neither statement has ever been true.

In addition, *La Verdad* tried to give the foregoing "facts" an air of authenticity, couching their carefully chosen rhetoric in the language of objective news reporting and investigatory reportage, implying that they culled the information from external sources. For example, the headline and title of the October 1, 1992 publication proclaimed "More Evidence of Montiel Davis' Links to the Tyrant Castro." App., *infra*, 21, 23. The same article stated that "we continue receiving reports of [Ms. Davis' husband's] links to the government of the tyrant who oppresses our country. And so as we receive these documents and we verify them, we publish them for the information of the

voters." App., *infra*, 23-24. This statement, above all, clearly implies verifiable facts underlying the Respondents' charge that Ms. Davis and her husband represent Castro's interests. "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that" Ms. Davis was closely linked to Castro. *Milkovich*, 497 U.S. at 21. "Nor does the general tenor of the article negate this impression." *Id. La Verdad*'s defamatory statements are actionable since, in the context of the articles in which they appear, they assert, imply and rely on provably false "facts." *Id.* at 18-19, 21.

This case presents a factual situation which contrasts sharply to those in prior decisions of this Court in which the context in which injurious and defamatory speech was situated provided enough information to make it clear to the reasonable reader that the speech was *not* stating or implying *actual* facts about the allegedly injured parties, notwithstanding that the statements, if taken literally, may have been defamatory and false. *See Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 876 (1988). Unlike the publications at issue in those cases, the *La Verdad* articles that defamed Ms. Davis presented false "facts" about the candidate in a deliberate effort to persuade voters and readers of the Respondents' periodicals that Ms. Davis is in league with Fidel Castro. Based on the representations of "fact" that the Respondents' articles laid out, a reasonable reader, knowing little else about Ms. Davis or her congressional campaign, would have interpreted those "facts" as indicating Ms. Davis' close association with Castro. Based on the immediate,

hostile, and violent reaction that the articles engendered, including bomb and death threats, many readers obviously did. *See* App., *infra*, 12, 15-16. To the extent that the decisions below relied upon analogies to *Bresler*, *Letter Carriers* and *Falwell*, they were thus erroneous because *La Verdad*'s defamatory statements could, and in fact did, convey to its readers that they stated *actual facts* about Ms. Davis. Here, as in *Milkovich*, "the [*La Verdad*] readers implicitly were told that only one conclusion was possible." *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 731 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2942, 119 L.Ed.2d 567 (1992).

Even if defamation law before *Milkovich* was an imperfect remedy for "[t]he destruction that defamatory falsehood can bring," *Milkovich*, 497 U.S. at 22-23 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (STEWART, J., concurring)), the state courts' interpretation of *Milkovich* below would place much defamatory speech beyond *any* legal remedy. The Respondents have never seriously challenged the fact that the speech at issue in the *La Verdad* articles was defamatory of Ms. Davis and her congressional campaign. Even the trial judge who dismissed the case acknowledged that, in Miami, if a person is publicly identified as a Castroite, "he might be dead in three minutes." Transcript of Oral Argument at 8. Nor did the Respondents ever question the fact that Ms. Davis and her campaign were seriously damaged by their statements. Yet, incredibly, the state courts interpreted *Milkovich* to preclude Ms. Davis' action for defamation.

### B. The Decisions of the State Courts Have Seriously Misinterpreted This Court's Decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and If Not Corrected, Will Render the Law of Defamation Meaningless Against Federal Office Seekers in This District

Prior decisions of this Court have sought to strike a balance between protection of the democratic values underlying the First Amendment and an individual's right to seek redress for defamation under state law. On one hand, this Court has protected the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). Yet, this Court has also recognized that, "imperfect though it is, an action for damages is the only hope of vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Rosenblatt*, 383 U.S. at 93 (STEWART, J., concurring) (cited in *Milkovich*, 497 U.S. at 23). The *Milkovich* case itself is nothing if not an explicit attempt to "hold[ ] the balance true," 497 U.S. at 23, and it shows that the scales are not invariably tipped in favor of uninhibited speech, even on issues of public concern.

As *Milkovich* explicitly recognized, this balance has adequately been struck by prior precedents of this Court. Most important in this regard are the "actual malice" standard of fault enunciated in *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, and the proof-of-falsity requirement established in *Philadelphia Newspapers, Inc. v.*

*Hepps*, 475 U.S. 767, 777 (1986). *See Milkovich*, 497 U.S. at 14-16. The actual malice standard permits the press to be openly critical of public officials and candidates for office without being required to guarantee the truth of their assertions; a publisher's false and defamatory assertions are protected under the First Amendment as long as the publisher did not know of the falsity of its assertions, or was not reckless as to whether they were false or not. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974); *New York Times*, 376 U.S. at 279-80. Similarly, *Hepps* eliminates the common law presumption that defamatory speech is false when a plaintiff seeks damages against a media defendant for defamatory speech of public concern, placing the burden of proof of falsity upon the plaintiff. 475 U.S. at 776-77. To *Hepps*, *Milkovich* simply added the refinement that defamatory speech *implying* a provably false statement of fact is actionable, consistent with the First Amendment, even if it might conceivably be characterized as merely an "opinion." *Milkovich*, 497 U.S. at 21.

However, the Respondents in this case argued below, and the Third District Court of Appeal apparently agreed, that the Respondents' defamatory "opinions" that Ms. Davis "represents Castro's interests in the United States" and is a "Castroite" were not actionable under *Milkovich* because they did not themselves imply provably false facts, and the false facts upon which those "political judgments" were based were not themselves defamatory. The problem with this reasoning is that, in a situation like the one this case presents, this creates an artificial division between the defamatory "opinion" and the false statements upon which they are based. The state courts' view is antithetical to the recognition in *Milkovich* that

actionable defamations can arise by implication from the total context of a publication. *Id.* at 21. As this Court acknowledged in that case, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are *either incorrect or incomplete*, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications." *Id.* at 18-19 (emphasis added).

Surely, if it is true that a purported statement of opinion that implies a provably false assertion of fact is actionable, then it must also hold true that a purported statement of opinion explicitly based on provably false assertions of fact adduced for the express purpose of persuading a reasonable reader of the reasonableness of that opinion must also be actionable. At least one other court in construing *Milkovich* appears to have reached this result. *See Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 202, 130 L.Ed.2d 133 (1994) ("[S]tatements of opinion can be actionable if they imply provably false facts, or rely upon stated facts that are provably false."). The state court's misconstruction of *Milkovich*, if allowed to stand, would eviscerate the law of defamation and would deny federal officials and those seeking federal office protection from defamation leading to violent assault.

## CONCLUSION

In sum, this Court should grant this Petition for a Writ of Certiorari to resolve the important question whether purported "opinions" explicitly based on false facts adduced to convince readers of the reasonableness of the "opinion" are actionable; to correct the erroneous interpretation of the state courts below of this Court's decision in *Milkovich*; and to protect the rights of redress for defamation of those who seek federal public office.

Respectfully submitted,

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